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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LARRY GENE HEATH,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Writ Of Certiorari To The Supreme Court of Alabama

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

(1) Was the prohibition of double jeopardy violated when Alabama tried, convicted, and sentenced Mr. Larry Heath to death for a murder that occurred in Georgia, where virtually all relevant activity occurred in Georgia, and where Georgia had previously placed Mr. Heath in jeopardy of his life, and convicted him of the same murder, and had sentenced him to life imprisonment?

(2) Is the dual sovereignty exception to the double jeopardy prohibition applicable to successive prosecutions of the same offense by two different states?

(3) If the dual sovereignty exception is to be applied to successive state prosecutions, should it be interpreted to allow multiple prosecutions based on identical conduct under virtually indistinguishable statutes serving identical interests?

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This Court having granted a writ of certiorari to review the judgment and opinion of the Supreme Court of Alabama entered in this proceeding on July 6, 1984, Petitioner, Larry Gene Heath, prays that the judgment affirming his conviction and death sentence be reversed.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is reported in *Ex Parte Larry Gene Heath*, 455 So. 2d 905 (Ala. 1984) and is set forth in the Joint Appendix. Also set forth in the Joint Appendix is the earlier opinion of the Alabama Court of Criminal Appeals, affirmed by the Supreme Court of Alabama, which is reported in *Larry Gene Heath* v. *State*, 405 So. 2d 898 (Ala. Crim. App. 1383). The Determination of Sentence by the Trial court of the Superior Court of Russell County, Alabama, February 10, 1983, is reported as an appendix to the opinion of the Alabama Court of Criminal Appeals.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Alabama was entered on July 6, 1984. *Ex Parte Larry Gene Heath*, 455 So. 2d 905 (Ala. 1984).

The petition for a writ of certiorari was timely filed within the extended period for filing on October 4, 1984. This Court's jurisdiction is properly invoked under 28 U.S.C. § 1257(3)(1976). The petition for a writ of certiorari was granted on March 4, 1985.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions involved are set out in Appendix A:

United States Constitution, Fifth Amendment.

United States Constitution, Fourteenth Amendment, Section one.

Alabama Code § 13A-5-40 (1981).

Alabama Code § 13A-5-45 (1981).

Alabama Code § 13A-5-49 (1981).

Alabama Code § 13A-5-50 (1981).

Alabama Code § 13A-6-2 (1977).

Alabama Code § 13A-6-43 (1977).

Alabama Code § 15-2-3 (1940).

Georgia Code § 26-1101 (1968).

Georgia Code § 27-2528 (1973).

Georgia Code § 27-2534.1 (1973).

STATEMENT OF THE CASE

On August 31, 1981, the body of Mrs. Rebecca Heath was discovered in the back seat of an automobile off the side of Smokey Road, in Troup County, Georgia. Mrs. Heath had lived with her husband, petitioner Mr. Larry Heath, in Russell County, Alabama, which is just across the Chattahoochee River from Chattahoochee County, Georgia.

After a joint investigation by the law enforcement authorities of Troup County and Russell County, a grand jury was empaneled in Troup County, regarding Mrs. Heath's death. (T.R. at 361-63, 366-67, 372, 381, 383-85, 386-90, 398-99.) On November 3, 1981, the grand jury returned indictments for murder, Ga. Code § 26-1101 (1968), (App. A at 8a) against Mr. Larry Heath and five other persons. The indictment alleged that "on the date of August 31, 1981, in the county aforesaid, [the six named persons] did then and there unlawfully and with malice aforethought cause the death of Rebecca McGuire Heath, a human being, by shooting her with a gun, a deadly weapon." (J.A. at 4, T.R. at 740). On November 3, 1981, the state of Georgia also served notice of an aggravating circumstance on Mr. Heath, thereby informing him that it would seek the death penalty. (J.A. at 5; T.R. at 742). Ga. Code § 27-2534.1(b)(6) (1973). (App. A at 9a.) On February 10, 1982, in

the Superior Court of Troup County, Georgia, Mr. Heath pleaded guilty to the murder charge. (J.A. at 6; T.R. at 744.) Ga. Code § 26-1101 (1968). (App. A at 8a.) Mr. Heath received a sentence of imprisonment for life. Ga. Code § 27-2528 (1973). (App. A. at 8a.) (J.A. at 6, T.R. at 744.)

On April 28, 1982, Mr. Heath was called to testify by the state of Georgia at the trial in Troup County of Charles Edward Owens and Gregory Hughes Lumpkin for the murder of Rebecca Heath. Mr. Heath refused to testify, asserting his fifth amendment privilege, citing the possibility that the state of Alabama might charge him with kidnapping his wife. (J.A. at 47-48, T.R. at 550-51.)

Seven days after Mr. Heath refused to testify in Georgia, on May 5, 1982, a grand jury was empaneled in Russell County, Alabama, and returned an indictment for the murder during a kidnapping of Rebecca Heath against Mr. Larry Heath. Ala. Code § 13A-5-40(a)(1) (1981). (App. A at 1a.) The indictment did not allege any place of commission of the crime. (J.A. at 7, T.R. at 728.)

On November 2, 1982, in the Superior Court of Russell County, Alabama, Mr. Heath entered pleas of autrefois convict and former jeopardy under the Alabama and United States constitutions, on the basis that he had already been indicted, found guilty, and was serving a sentence for the murder of Rebecca Heath. (J.A. at 8, 10, T.R. at 735-36, 745-46.) Two days later, Mr. Heath also entered a plea to the territorial jurisdiction of the Alabama court, on the basis that the alleged crime occurred in Troup County, Georgia. (T.R. at 763.) The trial judge rejected the pleas of autrefois convict and former jeopardy on December 10, 1982. (J.A. at 12-14; T.R. At 774-76.) A ruling on the plea to jurisdiction was postponed until the close of the state's case-in-chief. (T.R. at 778.)

On January 10-12, 1983, the state of Alabama tried Mr. Heath for the murder during a kidnapping of Rebecca Heath. At the close of the state's case, the defense argued its plea to jurisdiction should be granted because there had been no evi-

dence of any kidnapping, and because all of the evidence showed that Mrs. Heath was killed in Troup County, Georgia. (J.A. at 54-57; T.R. at 587-89.) The state argued that there had been a kidnapping, and that under Alabama law, where an offense "commences" in Alabama, it may be punished in Alabama, no matter where the offense was consummated. Ala. Code § 15-2-3 (1940). (App. A at 7a.) (J.A. at 56-57, T.R. at 589-90.) The state did not even suggest that the killing had occurred in Georgia. The trial judge rejected the plea to jurisdiction, without explanation. (J.A. at 57, T.R. at 590.) He also again rejected the pleas of autrefois convict and former jeopardy under the Alabama and United States constitutions, which Mr. Heath had once more raised. (J.A. at 57, T.R. at 590.)

In closing argument, the prosecution told the jury that under Alabama law "if they took her to Tennessee or to New York or California or even the moon before they killed her, it makes no difference . . ." because the crime "commenced" in Russell County (J.A. at 58, T.R. at 610-11.) The jury was not instructed that it had to make any finding as to where the killing occurred. (J.A. at 60, T.R. at 637.)

On January 12, 1983, the jury found Mr. Heath guilty of murder during a kidnapping. Ala. Code § 13A-5-40(a)(1) (1981). (App. A at 1a.) (J.A. at 61, T.R. 647-48.) The next day, the jury returned an advisory verdict of death. (J.A. at 62; T.R. at 697.) On February 10, 1983, the trial judge sentenced Mr. Larry Heath to death, finding as the sole aggravating circumstance that the "capital offense" of "murder during a kidnapping" Ala. Code § 13A-5-40(a)(1)(1981)(App. A at 1a), was "committed while the defendant was engaged in the commission of a kidnapping." Ala. Code § 13A-5-49(4) (1981) (App. A at 5a). (J.A. at 65-68, T.R. At 718-21.)

On Appeal, on July 5, 1983, the Alabama Court of Criminal Appeals rejected Mr. Heath's pleas of autrefois convict and former jeopardy under the Alabama and United States constitutions. (Opinion at J.A. at 78.) The Supreme Court of

Alabama granted a petition for a writ of certiorari, but on July 6, 1984, the court rejected Mr. Heath's pleas of autrefois convict and former jeopardy under the Alabama and United States constitutions. (Opinion at J.A. at 93.)

SUMMARY OF THE ARGUMENT

Mr. Heath was prosecuted twice for the same murder in violation of the double jeopardy clause. The two prosecutions were for the "same offense" as determined by reference to any test that this Court has ever suggested is relevant to such a determination. The only significant difference between the prosecutions was the respective aggravating circumstance relied on in the successive prosecutions. Aggravating circumstances are not elements of the offense for double jeopardy purposes; if they were, a state could try an individual a multitude of times for the same capital murder.

Virtually all of the relevant activity, including the murder, occurred in Georgia, and the state of Alabama has conceded as much. When the state with the closest nexus to a capital offense puts a person in jeopardy of his life for that offense, a subsequent prosecution for the same capital offense violates double jeopardy. The dual sovereignty exception is not applicable in such a case because it is only implicated where there is concurrent territorial jurisdiction. In this case, by contrast, Alabama is attempting to exercise extra-territorial jurisdiction.

The policies of the double jeopardy clause are grossly violated when an individual is subjected to repeated trials for his life based on the same offense. Not only is such an individual kept in endless anxiety about whether he will live or die, but there is also an intolerably increased risk of an erroneous death sentence being imposed. This country's abhorrence for such a practice is evidenced by the fact that diligent research has not turned up a single case where the same murder has formed the basis of two successive prosecutions.

The dual sovereignty exception does not save this conviction for another reason. That exception arose as a means of resolving potential inter-governmental conflict where (1) there is overlapping territorial jurisdiction (2) of governmental entities generally pursuing different interests (3) that generates a serious risk of inter-governmental conflict (4) and where multiple prosecutions are necessary for the satisfaction of both governments' interests. None of these conditions are present in the context of successive state prosecutions for the same offense.

The conclusion that the dual sovereignty exception does not save this conviction is confirmed by this Court's analysis of sovereignty. "Sovereignty" has been used to describe an analysis of the issues underlying governmental relationships. Only when those relationships require two prosecutions has this Court interpreted the double jeopardy clause to allow two prosecutions. This Court has never interpreted the double jeopardy clause to allow more than two prosecutions for the same offense. Affirming Mr. Heath's conviction on the basis of the dual sovereignty exception would result in the possibility of multiple, not just two, trials, convictions and punishments.

Alabama's legitimate law enforcement interests will not be thwarted by not applying the dual sovereignty exception to allow successive state prosecutions for the same offense. The Georgia prosecution satisfied the societal interests in deterring and punishing murders. Moreover, Alabama is free to prosecute for kidnapping or any other different offense done within its borders.

Should this Court apply the dual sovereignty exception to successive state prosecutions for the same offense, that exception should not apply where an individual is prosecuted under virtually indistinguishable statutes serving identical social interests.

ARGUMENT

I

DOUBLE JEOPARDY WAS VIOLATED WHEN ALABAMA TRIED, CONVICTED AND SENTENCED MR. HEATH TO DEATH FOR A MURDER THAT OCCURRED IN GEORGIA, WHERE VIRTUALLY ALL THE RELEVANT ACTIVITY OCCURRED IN GEORGIA, AND WHERE GEORGIA HAD PREVIOUSLY PLACED MR. HEATH IN JEOPARDY OF HIS LIFE, HAD CONVICTED HIM OF THE SAME MURDER, AND HAD SENTENCED HIM TO LIFE IMPRISONMENT.

A. Mr. Heath Was Placed In Jeopardy Of His Life Twice By Successive Prosecutions For The "Same Offense" Of Murder By The States Of Georgia And Alabama In Violation Of The Double Jeopardy Clause.[1]

That Mr. Heath was tried twice for the same offense seems beyond dispute. He has been convicted twice for the murder of the same human being. Moreover, the evidence employed to prove the state's case in Alabama—the testimony resulting from the joint investigation by Georgia and Alabama officials (T.R. at 361-63; 372-381, 383-90, 398-99)—is obviously the evidence that would have been relied upon by the state of Georgia had Mr. Heath not pleaded guilty in that state. Thus, regardless of the test employed to determine the meaning of the phrase "the same offense" for the purposes of the double jeopardy clause, Mr. Heath was twice convicted for the same offense. If the appropriate test is multiple trials and punishment for a single act, *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977), that test is obviously met here. If the test is whether the same evidence is employed to convict the defendant in the second prosecution, see *id.* at pp. 166-7n. 6; *Illinois* v. *Vitale*, 447 U.S. 410 (1980); then again that test is satisfied. A review of the

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[1] *Benton* v. *Maryland*, 395 U.S. 784 (1969) incorporated the double jeopardy prohibition of the fifth amendment into the due process clause of the fourteenth amendment.

relevant statutes and their interpretation demonstrates that "the same elements" test of *Blockburger* v. *United States*, 284 U.S. 299 (1932), is also satisfied.

Mr. Heath was convicted of murder in violation of Ga. Code § 26-1101(a)(1968)(App. at 8a.) That section requires proof of an unlawful killing with malice aforethought, which is defined as a "deliberate intention." He was convicted in Alabama of murder during a kidnapping in violation of Ala. Code § 13A-5-40(a)(1)(1981) (App. A at 1a). Murder is defined in Ala. Code § 13A-6-2 (1977) (App. A at 6a) as causing the death of a person "with intent." The murder offenses in both states require an intentional killing of a human being, and are not different from one another in any manner significant to this litigation. Thus, the elements of the two statutes being virtually indistinguishable, the *Blockburger* "same elements" test is also satisfied.

There was a difference in the aggravating circumstances relied upon in the two states, but that is merely a matter of sentencing and does not go to the elements of the respective offenses. In Georgia, Ga. Code § 26-1101(c)(1981) (App. A at 8a) makes murder a capital offense and Georgia Code § 27-2534.1(1973) (App. A at 9a) describes the circumstances which permit the imposition of the death penalty.

Essentially the same statutory scheme exists in Alabama. Murder is defined in Ala. Code § 13A-6-2 (1977). (App A at 6a.) Subsection (c) of this section makes murder a capital offense if committed under aggravated circumstances "as provided in article 2 of chapter 5," the relevant provision of which is Ala. Code 13A-5-40 (1981)(App at 1a) (and is the section referred to in Mr. Heath's indictment). That section, in turn, is included in chapter 5 of the Alabama Criminal Code, which is entitled "Punishments and Sentences." Thus, as in Georgia, the offense of which Mr. Heath was convicted in Alabama was murder, and

as a matter of sentencing the state relied on the kidnapping to provide the necessary aggravating circumstance.[2]

According to the relevant state statutes, then, Mr. Heath was twice convicted for the same offense of murder. The statutes in both states require an intentional killing for conviction. Upon conviction, the death penalty may be imposed only upon

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[2] The state of Alabama in its Brief in Opposition to Certiorari at p. 6 asserts that: "Under Alabama law capital offenses such as kidnapping/murder consist of two element (sic) but not two different offenses. *Ex Parte Baldwin*, 372 So. 2d 32 (Ala. 1979)." *Baldwin* did make that statement, *Baldwin*, 372 So. 2d at 33. However, in 1979 Alabama's fourteen capital offenses were still interpreted as consisting of fourteen different elements plus an intentional killing as aggravation. *See, e.g., Clements* v. *State*, 370 So. 2d 723, 725-26 (Ala. 1979). The statute was later reinterpreted, because the Constitution requires an intentional killing to justify a death sentence. "In order for the death sentence to be imposed . . . an intentional killing with aggravation must be shown. . . . The capital offenses set forth in § 13-A-5-31 contain an 'intentional killing,' the gravamen, and aggravation." *Ex Parte Dobard*, 435 So. 2d 1338, 1359 (Ala. 1983). The aggravating circumstances are "elements" of the capital offense simply because the state has required them to be proven at trial. *Id.* at 1357-8; *Beck* v. *State*, 396 So. 2d 645, 663 (Ala. 1981).

These cases, including *Baldwin*, concern the immediate past Alabama capital offense statute. However, an examination of the present statute reveals no material change. In *Ex Parte Bush*, 431 So. 2d 563 (Ala. 1983), the court held that mistakenly citing the 1975 statute rather than the current code was a technical, harmless error. *Id.* at 564-65.

Alabama courts previously held that simultaneous use of an "element" of a capital offense as an aggravating circumstance constituted punishing a defendant twice for the same act. *See, e.g., Bufford* v. *State*, 382 So. 2d 1162, 1173-74 (Ala. Crim App.), *cert. denied*, 382 So. 2d 1175 (Ala. 1980). This line of cases is now held inapplicable precisely because the non-murder "element" of the capital offense is in reality an aggravating circumstance. *Dobard* v. *State*, 435 So. 2d 1338, 1344 (Ala. Crim. App. 1982), *aff'd.*, 435 So. 2d 1351, 1357-58 (Ala. 1983).

proof of aggravating circumstances. Those aggravating circumstances are not elements of the offense, however. They are sentencing criteria.

Any argument to the contrary must be unavailing. A state could not constitutionally make aggravating circumstances into elements of the offense of murder by making each form of aggravated homicide a separate offense. If that could be done, a state could try a defendant a multitude of times for the same murder, with each trial involving only one of the various relevant aggravating circumstances. The result would be a series of trials for the death of the same human being, differing from each other only by reference to some ancillary aggravating matter. Indeed, this is precisely what Georgia and Alabama have done in this case. They have tried Mr. Heath for the same offense twice, and have simply emphasized different sentencing matters.[3]

Surely the double jeopardy clause prohibits double trials for the same offense as occurred in the present case. If it does not, presumably Alabama (or Georgia or both states) can now retry Mr. Heath for the same murder by relying on yet another aggravating circumstance. If the concern that an individual not be subjected to multiple prosecutions for the same offense means anything, certainly it must not allow endless trials for the same offense that differ from each other only by reference to an ancillary matter of sentencing.

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[3] The tension this possibility creates with *Bullington* v. *Missouri*, 451 U.S. 430 (1980), and *Arizona* v. *Rumsey*, 140 S. Ct. 2305 (1984), demonstrates that states should not be allowed to evade those rulings by redefining aggravating circumstances as elements of an offense.

B. Mr. Heath's Double Jeopardy Rights Were Violated By Being Tried And Convicted In Alabama After Having Been Tried And Convicted For The Same Offense In Georgia Where The Murder And Virtually All The Relevant Activity Occurred In Georgia.

Although the trial record is not completely unequivocal about the matter, a review of the record demonstrates that the only reasonable conclusion is that the murder with which Mr. Heath has been charged twice occurred in Georgia. The state of Alabama has virtually conceded this point throughout this litigation. In addition, virtually all the relevant planning activity occurred in Georgia. Under these facts, where the state with the most intimate ties and nexus to the criminal act has exercised jurisdiction over that act, double jeopardy should bar another state from subsequently convicting the defendant of the same offense.

At Mr. Heath's trial in Alabama, the following evidence was introduced regarding where Rebecca Heath was killed. C. L. Hudson, a resident of Troup County, Georgia, was called by the prosecution and testified that at about 9:10 a.m., on August 31, 1981, he was traveling west in Troup County on Smokey Road toward Hamilton Road, when he saw a light-colored Mustang turn around or pull out of a spot off the road. At that spot, there was a green car pulled off into the edge of the woods. Mr. Hudson stopped and investigated. The green car was still running, and the windows were fogged on the inside, "apparently somebody was inside the car breathing. . . ." He saw no one in the front seat of the car. He saw only a single, bluejean-covered knee sticking up in the back seat. Mr. Hudson left the scene, figuring "it was a kid's car or it was kids in the back seat. . . ." (J.A. at 16-20; T.R. At 333-39.)

William V. Pruitt, a resident of Troup County, Georgia, was called by the prosecution and testified that at about 11:05 a.m. on August 31, 1981, he was traveling west on Smokey Road in Troup County. He saw a green Oldsmobile off the side of the road. Mr. Pruitt first drove past, then stopped, backed up, and walked to the Oldsmobile. The motor was not running, but was

warm. He saw a person lying in the back seat. The "person" appeared to have been sitting on the passenger side, and to have fallen over. He then went to his truck and radioed his dispatcher, who contacted the sheriff's department. Mr. Charles Donald Mallory, a Troup County investigator, was the officer who arrived. (J.A. at 21-23; T.R. at 339-45.)

Mr. Charles Donald Mallory, chief investigator for the Troup County Sheriff's Department, was called by the prosecution. He testified that he arrived at the scene at about 11:15 a.m. He saw a body lying on the back seat of the Oldsmobile. He attempted to find a pulse in the arm of the lady, but found none. He then attempted to find a pulse in her neck. He found no pulse, "/b/ut did notice at that time that the body was extremely warm, to the point of being wet under the neck with perspiration." The person had her purse and her shopping bag. Mr. Mallory stated that he observed spots of blood in the car on the rear floorboard and the edge of the front right seat. In cross-examination Mr. Mallory stated that the blood "was not smeared as it would be, say, putting a body in the car. It looked more just like splattered type blood or just dropped on there." He further stated that: "I estimated, just from my experience in dealing with deaths, that she probably had been dead no longer than a couple of hours." (J.A. 24-28; T.R. at 346-58.)

Prentiss L. Griffith, the Sheriff of Russell County, Alabama, was called by the prosecution. He testified on cross-examination that he guessed it was about 50 miles from the Russell courthouse (which was 3 and a half miles from the Heath residence) to where the body was found. He had never actually been to the site. (J.A. 29-32; T.R. at 363-4.)

Mr. Griffith's guess is a good approximation. A perusal of any map of Georgia and Alabama immediately reveals that the only plausible route to take from Russell County to the place the body was found would require crossing immediately into Georgia and driving for a considerable time in Georgia. In light of this, and given the testimony recited above, the inference is unavoidable that the victim was not killed in Alabama and

transported into Georgia. She was obviously killed at or near the spot where her body was found in Georgia.

The strength of that inference undoubtedly explains why the state of Alabama has never once throughout the course of this litigation contested it. For example, in Respondent's Brief In Opposition To Certiorari in this case, at p.6, the state of Alabama argued that it had jurisidiction of the murder by virtue of an Alabama statute that grants jurisdiction for an offense commenced in Alabama and consummated outside of the state. Because there has never been a dispute as to the place of the kidnapping, the state's reliance on this statute impliedly concedes that the murder occurred in some state other than Alabama. On pp. 6, 7 of that Brief, the state of Alabama relies on certain acts of Mr. Heath to justify its jurisdiction and then asserts, *id.* at p. 7: "Thus not only did at least one-half of the crime, the kidnapping element, occur in Alabama, but also the Petitioner's primary inculpatory acts took place there." Quite obviously the state is impliedly conceding that the killing took place somewhere else. In this respect the state has been consistent. In its opening (J.A. at 15; T.R. at 309-10) and closing to the jury (J.A. at 58-59; T.R. At 610-11, 629), in its arguments to the trial judge (J.A. at 56-57; T.R. at 589-90), and in the instructions to the jury (J.A. at 60; T.R. at 637) the same implied concession was made. It is now too late to hear the state of Alabama argue to the contrary. The evidence only supports, and Alabama has virtually conceded, that the murder occurred in Georgia.[4]

Not only was the killing done in Georgia, virtually all the related activity occurred there as well. Mr. William J. Mauleg,

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[4] After the joint investigation by the Georgia and Alabama authorities, the Troup County grand jury returned an indictment alleging that the crime had been committed in Troup County, Georgia. (J.A. at 4; T.R. at 740.) The Russell County grand jury did not allege any place of commission. (J.A. at 7; T.R. at 728). Since the locus of an offense is res judicata in a state's courts, the Full Faith and Credit Clause, U.S. Const. art. IV, § 1 should bar relitigation of that ques-

special agent of the Georgia Bureau of Investigation, was called by the prosecution. He read a statement which he testified had been made by Mr. Heath. In that statement, Mr. Heath allegedly said that two or three weeks before September 4, 1981, he discussed the possibility of murder with his brother Jerry. He met with his brothers Jerry and Ricky a short time later in Columbus, Georgia. Five hundred dollars was passed to Ricky Heath, who was to serve as a go-between, but nothing came of this. Jerry Heath finally told Mr. Larry Heath to go to an apartment building in Columbus, Georgia. He talked there with Charles Edward Owens, a week before August 31, 1981. Mr. Owens and two other persons met with Mr. Heath a couple days later outside the Banner Building in Columbus, Georgia, where Mr. Larry Heath worked. Later that same day Mr. Larry Heath again met with these men, in Owens' apartment in Columbus, Georgia. Rebecca Heath was to be kidnapped while in Georgia. The next day Mr. Larry Heath stopped by Owens' apartment, in Columbus, Georgia to "finalize everything." This was either August 25th or 26th, 1981. For two days Rebecca Heath went to LaGrange, Georgia, but nothing happened. (JA. at 42-43, T.R. at 543-45.)

Mr. Larry Heath contacted Mr. Owens. Owens said his partner had disappeared, but that he had gotten another from Benning Hills, Georgia. Owens called Mr. Heath at 2:00 a.m. on Monday morning, August 31, 1981. Mr. Heath told Owens to call him back at 9:00 a.m. at Mr. Heath's work in Columbus, Georgia. At 6:00 a.m. Mr. Heath left his home. His automobile had a brick and a wire in it at this time. He drove to Owens' apartment in Columbus, Georgia. he talked with him, and gave Mr. Owens the phone number of Denise Lambert, who lived in Columbus, Georgia. Mr. Heath drove to the Lambert apart-

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tion by another state. *Commonwealth* v. *Firestone*, 253 Pa. Super. 577, 583, 385 A.2d 489, 492 (Pa. Super. Ct. 1978). *Cf. Sherrer* v. *Sherrer*, 334 U.S. 343, 354-55 (1948). The Georgia entry of Mr. Heath's guilty plea necessarily rested upon a finding that the murder occurred in Georgia.

ment. Owens called between 7:15 and 7:30 a.m. Mr. Heath drove to a gas station in Columbus, Georgia, followed by Lambert in her truck, and met Owens and his partner there, at about 5 or 10 minutes before 8:00 a.m. Mr. Heath got in Lambert's truck. They drove to Mr. Heath's home. Mr. Heath then drove to Lambert's apartment in Columbus, Georgia (J.A. at 44-45; T.R. At 545-46).

As this summary of the relevant portions of the record makes clear, both the murder and most of the underlying activity occurred in Georgia. That state took jurisdiction of the matter and placed Mr. Heath in jeopardy for his life. Indeed, the facts of this case strongly suggest that Alabama overreached its constitutional authority in exercising jurisdiction over these events that occurred in another state.[5] Assuming *arguendo* that Alabama did have concurrent jurisdiction with Georgia over the murder, once the state with the closest ties and most intimate nexus has taken jurisdiction and placed the defendant in jeopardy for his life, that should be the end of the matter. Indeed, once any state has taken jurisdiction over an event in which there is concurrent jurisdiction based upon extra-territorial jurisdiction, that should be the end of the matter. The double jeopardy clause should not be interpreted to allow multiple trials for the same offense merely because rules of jurisdiction allow more than one state to take jurisdiction over an event. To so construe the double jeopardy clause would be tantamount to its repeal. If every state with an interest in some criminal event has jurisdiction and can try a defendant for it, then a multiplicity of trials of the same offense may be brought.

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[5] *See Huntington* v. *Attrill*, 146 U.S. 657, 666, 669, 671-3 (1892); *State* v. *Huginski*, Vt. 95, 97-98, 422 A.2d 935, 937 (1980); R. Anderson, 4 *Wharton's Criminal Law & Procedure* § 1501 (1957). *Cf. Pennoyer* v. *Neff*, 95 U.S. 714, 720, 722-23, 728-30 (1878); *International Shoe Co.* v. *Washington*, 326 U.S. 310, 315-17 (1945).

Take the Heath case as an example. Suppose the victim, an Alabama resident, had been visiting someone in Tennessee and was kidnapped there. Suppose further that she had been transported through two other states and finally killed in Georgia with a gun stolen from Maryland. If the double jeopardy clause does not preclude multiple trials for the same offense by states with an interest in and thus concurrent jurisdiction of the offense, then six states could try our hypothetical defendant for murder: Alabama because the victim was a citizen of that state; Tennessee because of the kidnapping; Georgia because the crime occurred there; Maryland because a gun feloniously obtained there was used in the murder; and two states because a kidnapped person who ultimately was killed was transported illegally through those states.

The possibilities are endless, mindboggling, and must not be allowed. Once the state where the crime occurred has taken jurisdiction and prosecuted the offense, the double jeopardy clause should prohibit further prosecutions for that offense. This Court in *Nielsen* v. *Oregon*, 212 U.S. 315 (1909) stated that once one state prosecuted for an offense that was committed on the common boundary of two states, the other may not do so. *Id* at 320. That is equivalent to stating that once one state takes jurisdiction over an act, other states with concurrent jurisdiction may not do so. The same result must obtain in this case, unless the double jeopardy clause is to be emasculated.

The dual sovereignty exception to the double jeopardy clause does not affect this conclusion. As is argued in detail in Part II of the Brief, that exception should not apply to successive state prosecutions. Moreover, that exception arose to accommodate conflicts that result from two governments having concurrent territorial jurisdiction, as the states and the federal government do. *See, e.g. Moore* v. *Illinois*, 55 U.S. (14 How.)13 (1852); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959). The states do not as a rule possess concurrent territorial jurisdiction. Where the issue is *extra-territorial* jurisdiction, as it is in this case, the dual sovereignty exception is inapplicable, and

our abhorrence for subjecting a person to multiple trials for the same offense should result in applying the normal rule of the double jeopardy clause that only one prosecution for a single offense may be had.

C. The Policies Of The Double Jeopardy Clause Were Grossly Violated By Twice Placing Mr. Heath In Jeopardy Of His Life For The Same Offense.

By its very terms, the fifth amendment prohibits what happened to Mr. Heath—"nor shall any person be subject for the same offense to be twice put in jeopardy of life. . . ." U.S. Const. amend. V. Mr. Heath was charged by the state of Georgia with a capital offense and his life put in jeopardy for that offense by the filing of a Notice of Aggravating Circumstances. (J.A. at 4, 5; T.R. at 740, 742). The state of Georgia resolved the death penalty issue in Mr. Heath's favor by the imposition of his life sentence. *Cf. Arizona* v. *Rumsey*, 104 S. Ct. 2305 (1984); *Bullington* v. *Missouri*, 451 U.S. 430 (1980). Subseqeuntly, he was indicted for the same capital offense by Alabama and thus in the words of this Court in *Green* v. *United States*, 355 U.S. 184, 187-8 (1957), "repeated attempts to convict" Mr. Heath of capital murder occurred, "thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility" of an erroneous verdict. If repeated trials of an individual where the punishment is a prison term are not to be allowed, and if the endless anxiety and insecurity such a state of affairs would generate violates our fundamental values, *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977), *a fortiori* the same result should obtain where the issue is not a prison term but the extinguishing of a person's life.

The consequence of legitimizing what Alabama has done to Mr. Heath is bad enough standing alone, but this Court must also bear in mind that, by upholding Alabama's prosecution, it also creates the conditions under which not just two but an endless series of prosecutions could occur. Single states could

repeatedly try an individual for the same capital offense by varying the aggravating circumstance; every state with an "interest" in the transaction could try an individual for the same offense. Surely if the double jeopardy clause means anything, it prohibits a multiplicity of trials for the same capital offense with an individual kept in an endless state of jeopardy for his very life and with the resultant risk that eventually an erroneous judgment of death will be imposed. This Court should not permit repeated efforts to deprive a person of his life. Once a state with jurisdiction has put an individual in jeopardy of his life, the double jeopardy clause should not be interpreted to provide the opportunity for subsequent efforts to execute the individual.

So holding would not place this Court in opposition to the principles and traditions of this country; in fact, just the opposite is true. While a number of states do possess statutes allowing for some extra-territorial jurisdiction[6]—thus creating

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[6] *See, e.g.*, Colo. Rev. Stat. § 18-1-201 (1963); Fla. Stat. Ann. §§ 910.005 et seq. (West 1970); Kan. Stat. Ann. § 22-2612 (1970); N.C. Gen State. § 15A-134 (1973); W. Va. Code § 61-11-10 (1923). However, about forty states bar dual sovereign prosecutions in the area of drug offenses. L. Miller, *Double Jeopardy and the Federal System*, 102 (1968); *United States* v. *Jones*, 527 F.2d 817, 832 (D.C. Cir. 1975) (Wright, J., dissenting). Furthermore, twenty-seven states provide broad limitations upon dual sovereign prosecutions in general. Eleven states basically bar such prosecutions when they arise out of the same transaction. *See* Alaska Stat. § 12.20.010 (1962); Cal. Penal Code §§ 656, 793 (West 1970); Idaho Code § 19-315 (1972); Ind. Code § 35-41-4-5 (1977); Mont. Const. art. II, § 25, Mont. Code Ann. § 46-11-504 (1977); Nev. Rev. Stat. § 171.070 (1911); *State* v. *Hogg*, 118 N.H. 262, 385 A.2d 844 (N.H. 1978); N.D. Cent. Code § 29-03-13 (1943); Okla Stat. Ann. tit. 22, § 130 (West 1971); Va. Code § 19.2.-294 (1975) (prior federal prosecution); Wash. Rev. Code Ann. § 10.43.040 (1909).

Eight states bar a second prosecution arising out of the same transaction unless it is not for the same offense and it serves a distinct

ing the problem this Court faces in this case—counsel for Petitioner, after diligent search, has not been able to find a *single case* where multiple convictions for the same murder have been approved, and one certainly cannot find any other case where there is a second conviction for the same murder that results in a sentence of death. Indeed, virtually the only federal authority on the problem of concurrent state criminal jurisdiction is *Nielsen* v. *Oregon*, *supra*. The reason for this paucity of material is obvious. This nation abhors multiple trials and punishments, and thus that activity does not flourish.

In fact, it is difficult to find cases where the same noncapital offense is tried twice. There are a number of cases where states have upheld the constitutionality of separate trials for different parts of a criminal transaction where some parts occurred

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societal interest not served by the relevant criminal statutes of the first sovereign. *See* Ark. Stat. Ann. § 41-108 (1975); Ark. Stat. Ann. § 43-1224.1 (1965); Colo. Rev. Stat. § 18-1-303 (1973); Del. Code Ann. tit. 11, § 209 (1953); Hawaii Rev. Stat. § 701-112 (1972); Ky. Rev. Stat. § 505-050 (1974); *People* v. *Cooper*, 398 Mich. 450, 247 N.W.2d 866 (Mich. 1976); N.J. Stat. Ann. § 2C:1-11 (1978) (prior federal prosecution); 18 Pa. Cons. Stat. Ann. § 111 (Purdon 1972); *Commonwealth* v. *Mills*, 447 Pa. 163, 286 A.2d 638 (Pa. 1971).

See also Model Penal Code § 1.10 (Proposed Official Draft 1962).

Finally, eight states bar dual sovereign prosecutions of the same offense. *See* Ill. Rev. Stat. ch. 38, § 3-4(c) (1961); Kan. Stat. Ann. § 21-3108 (1977); Minn. Stat. Ann. § 609-045 (1983); Miss. Code Ann. § 99-11-27 (1942); N.Y. Crim. Proc. Law § 420.20 (1970); N.C. Gen. Stat. § 15A-134 (1973); *State* v. *Batdorf*, 293 N.C. 486, 238 S.E. 2d 497 (1977); Utah Code Ann. § 76-1-404 (1953); Wis. Stat. Ann. § 939.71 (1955).

Other states are likely to limit such prosecutions as a matter of policy, given the general distaste with which these proceedings are viewed. *Cf.* L. Miller, *Double Jeopardy and the Federal System* 56n.26 (1968).

in one state and other parts in another state,[1] but that does not advance analysis of multiple trials for the same offense. Moreover, in those few cases where multiple trials for the same offense do occur, there is not infrequently the suggestion that the first trial was a sham. Sham trials do not place a person in jeopardy. 21 Am. Jur. 2d *Criminal Law* § 257 (1981). Thus, such cases are unenlightening as to double jeopardy principles.

Consider, for example, *State* v. *Straw*, 626 S.W.2d 286 (Tenn. Crim. App. 1981). The defendant, a citizen of Massachusetts, defrauded a citizen of Tennessee of $500,000 based on acts which all took place in Tennessee. He was indicted in Tennessee on January 30, 1980; he was indicted in Massachusetts on March 3, 1980. The defendant pleaded guilty in Massachusetts on July 29, 1980 and received a jail term of 20 months. The defendant subsequently pleaded guilty to the same offense in Tennessee reserving his right to appeal. In affirming over a double jeopardy claim, the court commented that "it is interesting to note that Massachusetts thought the theft of $500,000.00 was worth only 20 months confinement. The expeditious plea and sentence in that state should not in consideration of societal fairness enable the appellant essentially to escape punishment." Id. at 287. The obvious implication is that there was doubt about the seriousness of the Massachusetts litigation. Although the Tennessee court did not go so far as to accuse the Massachusetts authorities of perpetrating a sham prosecution, the unspoken message is clear.

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[1] These cases typically involve a far greater nexus to the underlying transaction in the second state. *See, e.g., People* v. *Walker*, 123 Cal. App. 3d 981, Cal. Rptr. 177 (1981). In *Walker*, a Nevada conviction for receiving stolen property based on possession of stolen travelers' checks was followed by California charges and guilty pleas to robbery and using a gun in the commission of an offense, arising out of the California robbery in which the checks were stole. *See also State* v. *Straw*, 626 S.W.2d 286 (Tenn. Crim. App. 1981), discussed *infra* in the text of the Argument.

The proceedings in Georgia in Mr. Heath's case, by contrast, clearly were not sham proceedings. He was in jeopardy there for his life, and never throughout the course of these proceedings has there been a suggestion that the Georgia authorities were not operating in the utmost good faith. Indeed, to the extent there is any indication of bad faith in these proceedings, it is attributable to the state of Alabama. Alabama officials were apparently fully appraised of all the events in the Georgia proceedings, and cooperated in the investigation. (T.R. at 361-63; 366-67, 372, 381, 383-90, 398-99.) They certainly must have been aware that Mr. Heath pleaded guilty and was sentenced to life on February 10, 1982. Approximately three months later, on April 28, 1982, Mr. Heath was called to testify against the alleged actual killers in their trial in Georgia. Mr. Heath refused to testify on basis of this fifth amendment privilege. (J.A. at 47-48; T.R. at 550-51). Up until then, Alabama had shown no interest in prosecuting Mr. Heath. Seven days later, on May 5, 1982, a grand jury was empaneled in Russell County, Alabama, and returned an indictment for capital murder against Mr. Heath. This smacks of actual vindictiveness on the part of the Alabama authorities as well as strongly suggesting that the state of Alabama has sanctioned Mr. Heath's legitimate exercise of his fifth amendment right not to incriminate himself with the death penalty.

Not only is there no suggestion that Georgia officials acted in bad faith, but also there are grounds that suggest that Alabama officials did. Accordingly, this second prosecution cannot be justified on the grounds that the first prosecution was a sham. Thus, if the Court permits the Alabama conviction to stand, not only will it sanction one of the few cases in our national history where the exact same offense forms the basis for multiple trials and convictions by two states, and perhaps the only such case where there is not some mitigating factor such as a sham prosecution in the background, in addition it will allow what diligent research has shown to be the only case in

our history where two convictions for the same murder have been obtained by any two jurisdictions.[9]

Mr. Heath's double jeopardy rights clearly were violated by his prosecution in Alabama for the same murder for which he was previously prosecuted in Georgia. Therefore, this Court should reverse the Alabama conviction and remand Mr. Heath to the custody of the Georgia authorities to serve his life sentence.

II

THE DUAL SOVEREIGNTY EXCEPTION TO DOUBLE JEOPARDY IS NOT APPLICABLE TO SUCCESSIVE PROSECUTIONS BY TWO DIFFERENT STATES.

A. The "Dual Sovereignty" Exception Was Created To Minimize The Potential Conflicts That Result From Overlapping Territorial Jurisdiction And The Resultant Overlapping Of Statutory Schemes Of Quite Different Governmental Entities Pursuing Fundamentally Different Interests, And Its Scope Should Be Determined By The Policies That Led To Its Creation.

The dual sovereignty doctrine is an exception to the normal rules of double jeopardy. Indeed, it is an exception with a

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[9] *Cf. People* v. *Gay*, 407 Mich. 681, 289 N.W.2d 651 (1980). In *Gay*, defendants Gay and Geriofs were charged with three federal crimes, including murder of a bank teller during a robbery. Gay was convicted on all three counts, Geriofs was convicted on two counts but acquitted of the murder. Gay's convictions were reversed, but all three charges were brought again, and he pleaded guilty to all three. Each defendant was then charged with the same murder in Michigan's courts. Both defendants were convicted. The Michigan Court of Appeals reversed on state double jeopardy grounds. The Michigan Supreme Court affirmed. The court held that the state's interest in trying the defendants for murder did not differ substantially from that addressed in the federal prosecution, *id.* at 692-3 695-704, 289 N.W.2d at 654, 655-59, and that the state prosecutions therefore violated the state constitution's double jeopardy prohibition. *See also* Commonwealth v. *Mills*, 447 Pa. 163, 286 A.2d 638 (1971).

somewhat tainted lineage. When the fifth amendment was under consideration in Congress, language was proposed that would have limited its scope to those twice in jeopardy "by any law of the United States."[9] The language was rejected in favor of the language presently found in the fifth amendment, indicating that the drafters did not intend to permit multiple prosecutions for a "single offense." Indeed, this Court in one of its earliest discussions of the double jeopardy clause and federal-state relations intimated that multiple prosecutions were impermissible. *Houston* v. *Moore*, 18 U.S. (5 Wheat) 1, 22-24 (1820).

This early understanding of double jeopardy was soon supplemented by the dual sovereignty exception. In order to understand the scope of that doctrine, the conditions that gave rise to it must be examined. The possibility of successive state and federal prosecutions was not viewed early in our history as a serious problem because it was not anticipated that it would arise with any frequency.[10] The federal government was viewed as operating within its sphere, the various states within theirs, and the interests of the two general spheres of influence were sufficiently distinct that it was not intuitively obvious that federal and state criminal statutes would overlap substantially. *See Fox* v. *Ohio*, 46 U.S. (5 How.) 410, 432-35 (1847); *United States* v. *Marigold*, 50 U.S. (9 How.) 560, 567-70 (1850).

It was not long, though, before it must have become obvious that the respective scope of federal and state criminal jurisdiction could entail considerable overlap,[11] and thus this Court soon had to face the question of how to work out possible conflicts between the exercise of federal and state jurisdiction over the same act or transaction. Moreover, the earlier view

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[9] 1 *Annals of Cong.* 753 (J. Gales ed. 1789).

[10] L. Miller, *Double Jeopardy and the Federal System* 34-36 (1968).

[11] L. Miller, *Double Jeopardy and the Federal System* 36-7 (1968).

suggested in *Houston* v. *Moore*, that prosecution by either a state or the federal government would bar a prosecution by the other now presented greater problems. Even though there was substantial overlap in the coverage of statutes, those statutes often protected fundamentally different interests. *United States* v. *Cruikshank* 92 U.S. 542, 550, (1876). Allowing the prosecution by one government entity to preclude the other could result in the interests of either the state or the federal government not being completely protected, a result obviously to be avoided if possible. *See Marigold* 50 U.S. (9 How.) at 569-70.

Another possible method of reconciling the demands of federalism to the dictates of the double jeopardy clause was briefly considered and implicitly rejected. That was to allow for implicit federal pre-emption wherever there were overlapping statutes penalizing the same act. *See Moore* v. *Illinois*, 55 U.S. (14 How.) 13, 21-22 (1852). A consideration of *Moore* where the dual sovereignty exception was finally fully articulated indicates why that path was not followed.

In *Moore* v. *Illinois*, this Court upheld a constitutional challenge to the Illinois Fugitive Slave law. It was challenged on the grounds that the existence of federal legislation covering the same act gave rise to the risk of double trial and punishment violative of the double jeopardy clause. The Court rejected the challenge on the dual sovereignty grounds earlier articulated in *Fox*, and *Marigold* The decision was an inevitable consequence of its historical context. In *Moore*, this Court was being asked to strike down a type of state statute that was at the heart of a storm over the scope of states' rights, a storm so serious that it would eventuate in the Civil War. Moreover, it was being asked to do so where the laws of neither "sovereign" impinged upon the other's, *id.* at 18-22, and in a context where this Court surely was beginning to realize that state and federal criminal statutes were going to overlap and intersect in unpredictable ways. Thus, the Court created the means of accommodating the competing interests of the state

and national governments, see, Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. Miami L. Rev. 306, 313 (1963); a reconciliation perhaps made all the happier because it was dicta in each of the three cases.[12]

In sum, then the Court was faced with the problem of reconciling competing claims of jurisdiction asserted by the state and federal govenments through overlapping criminal statutes generally designed to further the very different interests of the respective governments. Thus "dual sovereignty" was born, at a time of growing national controversy over states' rights, as a means to reconcile the possible tensions that can result as the states and the federal government go about their respective concerns. Indeed, the label "dual sovereignty" is a misnomer to a degree. Although each of the early cases giving rise to the doctrine discuss ideas of sovereignty, they also discuss in detail the separate interests served by the criminal jurisdiction of the federal and state governments. *Fox*, 46 U.S. (5 How.) at 433-34; *Marigold*, 50 U.S. (9 How.) at 568; *Moore*, 55 U.S. (14 How.) at 19.

To be sure, the Court could have required the states to demonstrate in each prosecution where there was a risk of

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[12] No "dual sovereignty" case involved two actual prosecutions until *United States* v. *Lanza*, 260 U.S. 377 (1922). *Lanza* involved the unique circumstance of the explicit "concurrent" power of the federal government and the states under the eighteenth amendment. U.S. Const. amend. XVIII (repealed). It was not until 1959 that the Court upheld two actual prosecutions outside that context. *Bartkus* v. *Illinois*, 359 U.S. 121 (1959); *Abbate* v. *United States*, 359 U.S. 187 (1959). Both these cases preceded the incorporation of the double jeopardy prohibition into the fourteenth amendment. *Benton* v. *Maryland*, 395 U.S. 784 (1969). Doubt about the continuing vitality of the dual sovereignty theory has also been created by *Elkins* v. *United States*, 364 U.S. 206 (1960) and *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964), where different "sovereigns" were forbidden to act such that in combination they violated defendant's rights.

multiple trials or punishments that the interests served by the state prosecution were sufficiently different from those that would be served by the federal prosecution (or vice versa), a position adopted by the United States later both in the brief and oral argument in *Abbate*[13] and essentially in the *Petite* policy.[14] It is clear why the Court did not do so, however. To require such a review would have been an affront to the very dignity of the states that was at the heart of political discussions in pre-Civil War times.

"Dual sovereignty," in short, arose as what was perceived to be a necessary exception to the normal rules of double jeopardy, and the dual sovereignty exception should only apply where the reasons for its creation are present: 1. Substantially overlapping jurisdictions, 2. by governmental entitles pursuing quite diverse interests, 3. where there is a risk of interference by one governmental entity in the affairs of another, 4. and where multiple prosecutions are necessary for the satisfaction of the legitimate purposes of each governmental unit. As it discussed below in § D, none of these conditions are present in successive state prosecutions, and thus the conclusion is inescapable that no notion of dual sovereignty can apply to permit successive state prosecutions. Before that argument is made, however, the argument that dual sovereignty is a creation designed to ameliorate the tensions resulting from the interaction of fundamentally different governmental units will be supported first by demonstrating that the contemporary cases strongly support that proposition, and second by demonstrating that nothing useful emerges from focusing on "sovereignty" alone without reference to the interests "sovereignty" is designed to embody.

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[13] *Abbate* v. *United States*, 359 U.S. 187, 196 (1959) (Brennan, J., separate opinion).

[14] After *Petite* v. *United States*, 361 U.S. 529 (1960). The current statement of the policy may be found in *United States Attorney's Manual*, § 9-2.142 (January 3, 1980 revision).

B. The Contemporary Cases Support The Proposition That "Dual Sovereignty" Is To Be Applied Only Where There Is A Conflict Between Fundamentally Different Governmental Entities Pursuing Diverse Interests And Where There Is A Substantial Risk Of Inter-Governmental Conflict.

A comparison of the modern Court's two leading cases interpreting the dual sovereignty doctrine—*Waller* v. *Florida*, 397 U.S. 387 (1970), and *United States* v. *Wheeler*, 435 U.S. 313 (1978)—supports the proposition that the dual sovereignty exception should only be applied where there is substantially overlapping jurisdiction that would lead to the interference by one governmental entity in the affairs of another and where multiple prosecutions are necessary for the satisfaction of the legitimate purposes of each governmental unit.[15]

In *Waller*, the defendant was convicted in a city court for destruction of city property and disorderly breach of the peace. *Waller*, 397 U.S. at 388. Subsequently, he was convicted of grand larceny in a court of general jurisdiction based upon the identical acts that resulted in the city court convictions. This

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[15] An examination of *Bartkus* and *Abbate* also supports this conclusion. In each case the state and federal government shared territorial jurisdiction, of course. In *Bartkus*, the federal statute protected the federally insured banking system. *Bartkus*, 359 U.S. at 121-2. Illinois prosecuted and convicted under a simple robbery statute. *Id.* Furthermore, Illinois had a special interest in the offender, in that he fell under the habitual criminal statute, and was therefore sentenced to life imprisonment. *Id.* at 122. The second prosecution was therefore necessary to serve an important and unique state interest.

In *Abbate*, the state conviction was for conspiracy to injure or destroy private property. *Abbate*, 359 U.S. at 188. The defendants pleaded guilty and received three month sentences. *Id.* The federal conspiracy statute protected "means of communication operated and controlled by the United States," *id.* at 188-9, here including equipment used by the Strategic Air Command, among other federal instrumentalities. *Id.* The federal prosecution was obviously necessary to protect vital distinct federal interests.

Court reversed. In reversing, this Court did note that cities are not considered separate sovereign entities from the state within which they are located, and referred to the relevent Florida law. *Waller* 397 U.S. at 392-93.[16] In its most telling passage, however the Court stated:

> In this context, a "dual sovereignty" theory is an anachronism, and the second trial constituted double jeopardy in violation of the Fifth and Fourteenth Amendments to the Constitution.
>
> We decide only that the Florida courts were in error to the extent of holding that—"even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court." *Waller*, 397 U.S. at 395.

This passage is revealing because it suggests that the basis of the decision is that the interests at stake in the two prosecutions were identical. Because the defendant was previously placed in jeopardy *in light of those interests* by the first conviction, the second prosecution, also premised on those same interests, violated double jeopardy. Finally, there was in *Waller* no concern of intergovernmental interference. The state of Florida could easily decide how it wished such cases as *Waller*

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[16] Cities are not necessarily creatures of the state government. *See, e.g., City of New Orleans* v. *Harrison*, 257 La. 923, 244 So.2d 834 (1971) (state may not infringe upon city's constitutionally created system of traffic courts). Under the Montana constitution, the state and cities partake of "shared sovereignty." *State ex. rel. Swart* v. *Molitor*, 38 Mont. 71, 72-3, 621 P.2d 1100, 1102 (1981). Some cities were created by royal charter and have continuously exercised "sovereignty." M. Gelfand, *A Nation of Cities* 4-5 (1975). It is not clear that they can be distinguished from Indian tribes based upon a purely historical sovereignty analysis. *Cf. United States* v. *Wheeler*, 435 U.S. 313 (1978).

These facts demonstrate that a double jeopardy analysis that focuses directly upon "sovereignty" is likely to be unsatisfactory.

to be prosecuted and in which court they are to be tried. Florida simply cannot authorize trying them more than once.

This Court relied on the dual sovereignty theory eight years after *Waller* in *United States* v. *Wheeler*, 435 U.S. 313 (1978). An examination of the opinion in *Wheeler* discloses that the basis of decision was the Court's analysis of the interests underlying the successive prosecutions.

In *Wheeler*, the Court reviewed the constitutionality of a statory rape conviction under federal law premised on the same conduct that a year earlier to the rape conviction had given rise to a conviction for disorderly conduct and contributing to the delinquency of a minor in a tribal court. In its opinion, the Court assumed that the "contributing to the delinquency" offense was a lesser included offense of statutory rape. *Wheeler*, 435 U.S. at 317n. 4. Nevertheless, the Court affirmed on two grounds. The first was the idea of dual sovereignty. *Id.* at 317-30. As will be discussed in the next section of the Brief, reliance on ideas of sovereignty to determine the scope of the double jeopardy clause is a highly problematic enterprise. Second, the Court focused on the interests at stake in the two prosecutions and concluded that what was involved here was the overlap of two statutory schemes emanating from two fundamentally different governmental entities. Thus, because of the differing interests at stake and protected by the two governments, the two prosecutions did not violate double jeopardy.

This Court first noted that, given the different interests of the federal and tribal governments, the failure to allow multiple prosecutions could easily result in each governmental entity frustrating the concerns of the other. *Id.* at 317-18. The Court proceeded to state:

> This problem would, of course, be solved if Congress, in the exercise of its plenary power over the tribes, chose to deprive them of criminal jurisdiction altogether. But such a fundamental abridgement of the powers of Indian tribes might be thought as undesirable as the federal preemption of state criminal jurisdiction that would have

> avoided conflict in *Bartkus* and *Abbate*. The Indian tribes are " distinct political communities" with their own mores and laws, *Worcester* v. *Georgia*, 6 Pet., at 557; *The Kansas Indians*, 5 Wall. 737, 756, which can be enforced by formal criminal proceedings in tribal courts as well as by less formal means. They have a significant interest in maintaining orderly relations among their members and in preserving tribal customs and traditions, apart from the federal interest in law and order on the reservation. Tribal laws and procedures are often influenced by tribal custom and can differ greatly from our own. See *Ex parte Crow Dog*, 109 U.S., at 571.
>
> Thus, tribal courts are important mechanisms for protecting significant tribal interests. Federal pre-emption of a tribe's jurisdiction to punish its members for infractions of tribal law would detract substantially from tribal self-government, just as federal pre-emption of state criminal jurisdiction would trench upon important state interests. Thus, just as in *Bartkus* and *Abbate*, there are persuasive reasons to reject the respondent's argument that we should arbitrarily ignore the settled "dual sovereignty" concept as it applies to successive tribal and federal prosecutions. *Wheeler*, 435 U.S. 313 at 331-32 (footnotes omitted).

Thus, *Wheeler* is not premised just upon the fact that in some unspecified way Indian tribes possess or exercise aspects of sovereignty. Instead, *Wheeler* is obviously a lineal descendant of cases such as *F[illegible]* and *Marigold* where the Court attempted to construct a method to alleviate the conflicts that can arise when fundamentally different governmental institutions pursuing quite different interests, happen to legislate in such a way as to make certain acts criminal under the laws of both governmental units. As in the earlier cases, the Court could have found double jeopardy to apply, but that risks too much inter-governmental conflict. The Court alternatively could have found there to be federal pre-emption, but that would have worked too drastic a change on an ongoing social dynamic and political entity. In light of these concerns, then, once again this Court concluded that the institutional interests outweighed those of the individual and thus that dual prosecutions

had to be permitted. That decision may have been articulated in the language of sovereignty, but it seems clear that the true basis of decision was an analysis of the interests at stake.

The contemporary decisions of the Court support the proposition that "dual sovereignty" is a label that is applied to the conclusion that sufficient governmental interests are at stake to justify multiple prosecutions notwithstanding the adverse impact that conclusion has on the interests of the defendant. When that is not the case, however, the interests of the individual should take precedence and one's rights under the double jeopardy clause should be respected. As will be agrued in § D, below, that is the situation in Mr. Heath's case. Before making that argument, however, the idea of "sovereignty" as an independent limit on the double jeopardy clause will be discussed.

C. "Dual Sovereignty" As An Expression Of Ideas Of Sovereignty Is An Inadequate Basis For Determining The Scope Of The Double Jeopardy Clause.

This Court consistently has invoked the idea of sovereignty to justify decisions allowing successive prosecutions based on the same act. As was argued in § B, supra, the cases are best understood as primarily relying on the label "dual sovereignty" to express a conclusion reached by analyzing the interests at stake in cases of multiple prosecutions. This conclusion is furthered by the fact that it is quite unclear what the concept connotes or what are its implications.

"Sovereignty" is apparently used to refer to "the ultimate source of the power under which the respective prosecutions were undertaken," *Wheeler*, 435 U.S. at 320. In the context of successive federal and state prosecutions, the Court has asserted that "State and Federal Governments 'deriv[e] power from different sources,' each from the organic law that established it." *Id*, at 320, quoting from *United States* v. *Lanza*, 260 U.S. 377, 382 (1922). This suggests that one must look to the "ultimate source of power" in determining the meaning of

sovereignty and that when one looks there "organic law" will be found that establishes independent power in the state and federal governments.

However effective and accurate these assertions are as political symbolism they are considerably less useful if taken as descriptions of political reality. First, to the extent there is an "ultimate source of power" upon which rests state and federal prosecutions it is the same in both instances. It is the consent of the governed, of We the People. The U.S. Constitution, as well as state constitutions, are derivative of that power and are not themselves "ultimate sources of power." *See Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1792). Moreover, state and federal constitutions are themselves in a highly symbiotic relationship. For example, the federal government is charged to maintain a Republican form of government in the states, U.S. Const. art. IV, § 4, and state governments, duly formed under state constitutions, are accorded a significant role in the amendment of the federal constitution. U.S. Const. art. V. Thus, to the extent that there exists an "ultimate source of power," it is quite clear that it resides in the body politic and nowhere else, and that state and federal constitutions, which legitimize state and federal statutory law, are derivative of that power.

Perhaps, though, "ultimate power" in this context can be conceived in somewhat less grandiose terms. For example, sovereignty might mean the "ultimate" (used somewhat loosely) authority to control a prosecution. This is probably what was being referred to in *Waller*, where the state legislature could decide which court could try which offense and where the legislature had virtually absolute control over the power exercised by the city. That idea cannot explain cases such as *Wheeler* and *Bartkus*, however. When a legitimate federal statute overlaps that of a state or Indian statute, there exists a power of federal pre-emption under the supremacy clause. *See e.g. Bartkus*, 359 U.S. at 157 (Black, J. dissenting). Thus, it is accurate in every relevant sense that state or Indian prosecutions in such cases occur at the pleasure of Congress.

Similarly, in *Wheeler*, after describing the Indian tribe as a "separate sovereign," the Court pointed out that not only could Congress eliminate any right of the tribe to punish its members, but also that there was a federal statute that limited punishment imposed by tribal courts to a maximum of six months in prison or a five hundred dollar fine. *Wheeler*, 435 U.S. at 327-28. It is respectfully suggested that it is rather difficult to reconcile the idea of Indian tribes as "sovereign" in any serious sense relevent to Mr. Heath's prosecution with the federal limitation on their power to try cases to petty offenses. If sovereignty in fact has its referent in "ultimate sources of power," it is clear that neither states nor tribes possess such power in the context of any case that the Court has decided on the basis of "dual sovereignty." Thus, it is not "sovereignty" as such that has motivated this Court's decisions; it is rather sovereignty as a summary of the underlying interests that has done so.[17]

This conclusion is confirmed by considering other ways to define sovereignty. One meaning of the term may refer to the historical source of power, or more accurately put, of self-governance. Thus, the thirteen original states were once independent and exercised all the powers their respective populations accorded them, one of which was the power to criminalize conduct. The difficulty with this understanding is that most of the present states did *not* come to the Union out of such an independent status, and thus as applied to them the description is simply wrong.

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[17] In *Wheeler*, the Court indicated its uncertainty as to the outcome if a tribe lost and then regained its "sovereignty" through federal statutes that first removed and then restored the tribe's power to enforce its own criminal statutes. *Wheeler*, 435 U.S. at 328n. 28. Peitioner respectfully suggests that the applicability of the double jeopardy prohibition and the dual sovereignty exception should not turn upon such trivial facts, but rather on the weighing of fundamental interests.

Most states were created out of territories held by the federal government. These states did not "historically" possess the powers of original states; Congress has plenary power over territories based on U.S. Const. Art. IV, § 3. Indeed, the Court, in a unanimous opinion has said in dicta that "the relationship of a territory to the Federal Government has been accurately compared to the relationship between a city and a state." *Wheeler*, 435 U.S. at 321 n. 16. It is obviously inadequate, then, to argue from the "sovereign power" of states in a historical sense, when most states were created by the power of the central government. Moreover, it is obviously begging the question to assert that, once a territory becomes a state, it then possesses these "sovereign" powers that are under examination. A territory admitted to statehood certainly possesses powers, but they are those accorded the state by the constitutional process of admission. U.S. Const. art. IV, § 3. It does not possess whatever power it has for reasons anterior to or distinct from that scheme.[18]

This argument, it should be noted, is not an assault on state governments as important elements in our constitutional scheme, nor is it an assault on the "dual sovereignty" exception as it has been developed by this Court. Rather, it is an attempt to show that it is a question begging exercise to argue that dual prosecutions are permitted by state and federal governments for the same offense *because* they are "separate" sovereigns. Rather they are sovereign to that extent *because* this Court

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[18] The dual sovereignty theory does not apply to the federal government and a territory. *Puerto Rico* v. *Shell Co.*, 302 U.S. 253 (1937). And yet, it is the "universal practice" to permit newly created states to prosecute crimes committed in the territory before the state existed. *Higgins* v. *Brown*, 1 Okla. Crim. 33, 69, 94 P. 703, 717 (Okla. 1908); *Ex Parte Barber*, 87 Okla. Crim. 201, 204-10, 196 P.2d 695, 697-700 (Okla. Crim. App.), *cert. denied*, 335 U.S. 847 (1948). This is yet another situation where the outcome cannot be reconciled with an analysis of "sovereignty" as such. Rather, this result is a function of the underlying interests involved.

has so construed the double jeopardy clause. That construction, though, can rationally rest only on this Court's analysis of the underlying interests at stake.

As has previously been pointed out, both the history of the creation of the double jeopardy clause and this Court's earliest discussion of it suggest that the views of the Framers were that dual prosecutions by state and federal governments were not to be allowed. This Court has obviously found that position untenable and has created a dual sovereignty exception. But in doing so, it has pointed to no historical materials mandating that result. In fact, after a review of the relevant materials, Justice Frankfurter, speaking for the Court in *Bartkus* v. *Illinois*, 359 U.S. 121, 131 (1959), asserted that the relevant historical materials are inconclusive. That is certainly true to some extent. If it is true, however, it will not do to invest the word "sovereignty" with meaning based upon that ambiguous history. The alternative, of course, is to invest it with meaning based on the underlying interests. Petitioner respectfully submits that that is what the Court has done in this context, as it has done in related ones. In its examination of the right to retry an individual after an appellate reversal of his conviction, this Court asserted that "of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implementations of that principle for the sound administration of justice." *United States* v. *Tateo*, 377 U.S. 463, 466 (1964). What was true in *Tateo* is true in the present case as well. It is not abstractions about "sovereignty" that matter; it is instead the underlying interests. When those interests are examined in the context of successive state prosecutions, as is done in the next section of this Brief, it will be observed that they do not support the application of the dual sovereignty exception to successive state prosecutions for the same offense.

D. The Policies Of The Dual Sovereignty Exception Are Not Implicated By Successive State Prosecutions For The Same Offense And Consequently The Double Jeopardy Clause Should Forbid Successive State Prosecutions For The Same Offense.

The policies that form the basis of the dual sovereignty exception to double jeopardy militate against applying it to allow successive state prosecutions for the same offense. In other areas where dual sovereignty has been applied, both relevant governments had jurisdiction over the same landmass. There is concurrent territorial jurisdiction in a state government and the federal government and, at the pleasure of Congress, the same state of affairs pertains in Indian Reservations. This created the need to construct rules that would facilitate the resolution of potential inter-governmental conflict. "Dual sovereignty" responded to that need. States, by contrast, do not possess substantially overlapping jurisdiction. In fact, the single most important determinant of the scope of state jurisdiction is the territoriality principle.[19] Thus, only rarely will problems of concurrent jurisdiction arise, and the need for a general rule, especially one that adversely affects the important double jeopardy rights of individuals, is reduced commensurately.

When a case of concurrent jurisdiction does arise, only rarely will the statutory schemes of the two states be in conflict. The interests served by the criminal laws of the various states are not widely disparate. There are differences among the states, of course, but it is also true that state criminal law is primarily designed to protect the safety of citizens, their property and the public morals.[20] The typical state to state relationship in the context of the criminal law, in short, is one of similar entities pursuing similar purposes. It is not a rela-

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[19] *See supra* note 5.

[20] *See* W. LaFave & A. Scott, *Handbook on Criminal Law* 117 (1972).

tionship of quite different entities pursuing highly divergent interests. Thus, where two states have concurrent jurisdiction over a criminal event, the social interests at stake will virtually always be satisfied by a single prosecution of a particular crime.

Because the interests of the states in the context of the criminal law are not diverse, the prosecution of an offense in one state will not lead to interference by one governmental entity with the pursuit of the legitimate interests of another. Quite the contrary is true. The first prosecution will satisfy the interests in law and order possessed by all states. In fact, allowing multiple prosecutions may redound to the detriment of the states' interest in law and order. Exposing a criminal defendant to multiple trials in multiple states for the same offense will reduce the incentive on the part of criminal defendants to plea bargain with any particular state. There is only one reason why a second state would wish to prosecute for the same offense after trial in the first state, and that is to increase the punishment given after the first trial.[21] The reason a defendant pleads is to eliminate the risk of greater punishment. If that risk cannot be eliminated by a plea, as will be true if this Court applies the dual sovereignty exception to successive state

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[21] In *Ciucci* v. *Illinois*, 356 U.S. 571 (1958), the Court in a *per curiam* opinion upheld by a 5-4 vote an Illinois conviction and death sentence. The defendant had allegedly killed his wife and three children. He was prosecuted for one death, at a trial where evidence of all four killings was introduced, was convicted, and received a 20 year sentence. At a second such trial, he received a 45 year sentence. Finally, at a third trial, he received the death penalty. Justices Harlan and Frankfurter, two of the majority, suggested that, if the state's motive was to prosecute until it got a death sentence, that might constitute a violation of due process. *Id.* at 573. Justice Douglas dissented, speaking for Chief Justice Warren and Justice Brennan, on the basis that the repeated prosecutions had violated due process. *Id.* at 575. Alabama had no reason to prosecute Mr. Larry Heath except to seek to raise his punishment from life in prison to death.

prosecutions, defendants will be discouraged from entering into plea bargaining. In that event, a theory designed to reduce intergovernmental friction will act to increase it by allowing the risk of prosecution in one state for the same offense to make it more difficult for another state to engage in plea discussions with criminal defendants.[22]

Mr. Heath's case is a perfect example of all of these points. He was convicted of murder in Georgia for the killing of his wife. Whatever social interests there are in punishing and deterring murders, certainly they were satisfied by that conviction. Alabama has never suggested that it has some interest in this event that has not been satisfied by the Georgia conviction. Moreover, Alabama has never asserted that its interests are different from or antagonistic to Georgia's in this context. It merely asserts the right to retry Mr. Heath for no other reason than that it wishes to do so. The double jeopardy clause hopefully is not such an emasculated protector of fundamental human rights as to be avoided so easily. It stands for the proposition that a mark of civilization is that a society tries its grievances against citizens once and then the matter is left in repose. It may be that this principle needs qualification in light of our federal system when fundamentally different governmental entities pursuing quite diverse interests come into contact. When that is not the case, and it is *not* the case in the context of successive state prosecutions for the same offense, then the qualification should end and the normal rule forbidding multiple trials and punishments should be applied.

It also bears reiterating that should this Court extend the dual sovereignty exception to successive state prosecutions, the Court will not simply be permitting two prosecutions for the same offense as is normally true in cases where dual sovereignty applies. It will instead be authorizing a multiplic-

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[22] This is not nearly as serious a problem in the federal-state context, because of the *Petite* policy, (see *supra* note 14 and accompanying text), and because only two governments are usually involved.

ity of trials and punishments for the same offense, for whatever state has jurisdiction over an aspect of the relevant events apparently would be authorized to try the individual. The incongruity of that result with the aspirations underlying the double jeopardy clause is obvious.

E. Forbidding Successive State Prosecutions For The Same Offense Will Not Thwart Legitimate State Law Enforcement.

Because the policies that gave rise to the dual sovereignty exception would not be furthered by applying the exception to successive state prosecutions for the same offense, it ought not to be so applied. It is important to recognize that not applying the dual sovereignty exception to successive state prosecutions will not retard legitimate law enforcement objectives. As argued in § D, supra, where a state has already prosecuted for the offense in question, legitimate state interests have already been satisfied. By contrast, where a second state prosecutes for a different offense that is within its jurisdiction, double jeopardy would not be violated.

In Mr. Heath's case, for example, double jeopardy surely would not have been violated if Alabama had indicted and tried him for kidnapping. That is not what occurred, however. He was tried for murder, with kidnapping as an aggravating circumstance. The legitimate state interest in prosecuting Mr. Heath for the murder had already been satisfied, and the second prosecution for that offense violated double jeopardy. Kidnapping is a different offense, however, and a prosecution in Alabama for that offense would have been permissible.[23] Thus, Alabama cannot be heard to complain that a holding by this Court in favor of Mr. Heath will substantially affect its law

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[23] This would not be true if the Court adopted the "same transaction" test. *See Borchardt* v. *United States*, 105 S. Ct. 341 (1984) (Brennan, J., dissenting to denial of writ of certiorari). *Cf. Ashe* v. *Swenson*, 397 U.S. 436 (1970); *Brown* v. *Ohio*, 432 U.S. 161 (1977).

enforcement efforts. Rather, Alabama has overreached its legitimate authority in this case, and it ought not to be allowed to do so.[24]

Nor would such a rule create a race to the courthouse or encourage sham prosecutions designed to protect a person from prosecution in other states. As to the first issue, successive state prosecutions for the same offense are exceedingly rare, at least so far as Petitioner's diligent research has determined. The reason is surely that states normally cooperate in cases of concurrent jurisdiction. There is no reason to expect that to change. In fact, a holding by this Court in favor of Mr. Heath would merely encourage what must be the present practice. As to the second issue, as previously noted, sham prosecutions designed to shield individuals from being exposed to jeopardy have long been viewed as not invoking double jeopardy protections, and that doctrine is more than adequate to accommodate the problem.

In essence, then, all Mr. Heath is asking for is the application of the normal rule that when a court with jurisdiction over an event takes jurisdiction, that should be the end of the matter.[25] An individual ought not to be subjected to multiple trials and punishments merely because more than one political entity has one form of jurisdiction or another over the event in question. So holding is consistent with the policies of the double jeopardy clause, provides the individual with protection from the horri-

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[24] If the first state's prosecution was a sham, or if the second state truly seeks to protect a distinct and important societal interest not protected by the first state's criminal statute, then a second prosecution might be justifiable. However, despite every opportunity, Alabama has never suggested that either condition obtains. Clearly, this is not such a case.

[25] Traditionally, jurisdiction over a crime resides solely in the courts of the state where it was committed, and the laws of that state exclusively govern the nature of the offense. *Huntington* v. *Attrill*, 146 U.S. 657, 669 (1892); J. Story, *Conflicts of Law* 516 (1834).

ble harrassment of multiple trials and punishments and furthers rather than retards the federal scheme of government.

For all of the reasons given above, this Court should find that Mr. Heath's rights under the double jeopardy clause and the fourteenth amendment due process clause have been violated by the Alabama prosecution for the murder previously prosecuted by Georgia. Accordingly this Court should reverse the Alabama sentence of death and remand Mr. Heath to the Georgia penal officials to serve his sentence of life imprisonment.

III

IF THE DUAL SOVEREIGNTY EXCEPTION IS APPLIED TO SUCCESSIVE STATE PROSECUTIONS, IT SHOULD NOT BE INTERPRETED TO ALLOW MULTIPLE PROSECUTIONS BASED ON IDENTICAL CONDUCT PROSECUTED UNDER VIRTUALLY INDISTINGUISHABLE STATUTES SERVING IDENTICAL INTERESTS.

Should this Court decline to rule the dual sovereignty exception inapplicable to successive state prosecutions, it ought not to interpret the exception to allow for prosecutions based on the same conduct under virtually identical statutes serving identical interests. For all the reasons discussed in Part II, supra, successive state prosecutions do not pose the same problems as successive prosecutions involving the interaction of two fundamentally different governmental entities. The criminal laws of the various states pursue basically the same interests, inter-state cooperation apparently occurs (as this case demonstrates), and the frequency of prosecutions based on the same conduct is virtually nonexistent. Thus, it would be quite manageable to allow defendants the opportunity to demonstrate that the second (or third, etc.) prosecution they are facing will not further interests distinct from those served by earlier prosecutions.

Accordingly, given the important purposes of the double jeopardy clause, should the Court find the dual sovereignty

exception applicable to successive state prosecutions, at a minimum the Court should interpret the dual sovereignty exception to allow defendants to show that no separate state interests are being advanced by the subsequent prosecution or prosecutions. Mr. Heath has already demonstrated that the Alabama prosecution serves no separate interests, and the state has never even suggested that this is not true. Thus, his conviction should be reversed. Alternatively, his case should be remanded to allow him to make the required showing more completely.

CONCLUSION

Petitioner respectfully requests that, if the Court holds that his rights under the double jeopardy clause and the due process clause of the fourteenth amendment were violated by his being prosecuted by the state of Alabama for the same capital murder for which he was previously prosecuted by the state of Georgia, the Court reverse Petitioner's Alabama conviction for murder, and remand Mr. Heath to the Georgia authorities to continue serving his sentence of life imprisonment. Alternatively, this Court should remand this case to the Alabama courts to allow Mr. Heath to demonstrate that his prosecution in Alabama served no different interests from his prosecution in Georgia and thus that his double jeopardy rights were violated by his prosecution in Alabama.

Respectfully submitted,

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APPENDIX

APPENDIX A

Constitutional and Statutory Provisions Involved

United States Constitution, Fifth Amendment, provides in part:

[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .

United States Constitution, Fourteenth Amendment, Section One, provides in part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Alabama Code § 13A-5-40 (1981) provides:

§ 13A-5-40. Capital offenses.

(a) The following are capital offenses:

(1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant;

(2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant;

(3) Murder by the defendant during a rape in the first or second degree or an attempt thereof committed by the defendant; or murder by the defendant during sodomy in the first or second degree or an attempt thereof committed by the defendant;

(4) Murder by the defendant during a burglary in the first or second degree or an attempt thereof committed by the defendant;

(5) Murder of any police officer, sheriff, deputy, state trooper, federal law enforcement officer, or any other state or federal peace officer of any kind, or prison or jail guard, while such officer or guard is on duty or because of some official or job-related act or performance of such officer or guard;

(6) Murder committed while the defendant is under sentence of life imprisonment;

(7) Murder done for a pecuniary or other valuable consideration or pursuant to a contact or for hire;

(8) Murder by the defendant during sexual abuse in the first or second degree or an attempt thereof committed by the defendant;

(9) Murder by the defendant during arson in the first or second degree committed by the defendant; or murder by the defendant by means of explosives or explosions;

(10) Murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct;

(11) Murder by the defendant when the victim is a state or federal public official or former public official and the murder stems from or is caused by or is related to his official position, act, or capacity;

(12) Murder by the defendant during the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewmen thereon or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Murder by a defendant who has been convicted of any other murder in the 20 years preceding the crime; provided that the murder which constitutes the capital crime shall be murder as defined in subsection (b) of this section; and provided further that the prior murder conviction referred to shall include murder in any degree as defined at the time and place of the prior conviction; and

(14) Murder when the victim is subpoenaed, or has been subpoenaed, to testify, or the victim had testified, in any preliminary hearing, grand jury proceeding, criminal trial or criminal proceeding of whatever nature, or civil trial or civil proceeding of whatever nature, in any municipal, state, or federal court, when the murder stems from, is caused by, or is related to the capacity or role of the victim as a witness.

(b) Except as specifically provided to the contrary in the last part of subdivision (a)(13) of this section, the terms "murder" and "murder by the defendant" as used in this section to define capital offenses mean murder as defined

in section 13A-6-2(a)(1), but not as defined in section 13A-6-2(a)(2) and (3). Subject to the provisions of section 13A-5-41, murder as defined in section 13A-6-2(a)(2) and (3), as well as murder as defined in section 13A-6-2(a)(1), may be a lesser included offense of the capital offenses defined in subsection (a) of this section.

(c) A defendant who does not personally commit the act of killing which constitutes the murder is not guilty of a capital offense defined in subsection (a) of this section unless that defendant is legally accountable for the murder because of complicity in the murder itself under the provisions of section 13A-2-23, in addition to being guilty of the other elements of the capital offense as defined in subsection (a) of this section.

(d) To the extent that a crime other than murder is an element of a capital offense defined in subsection (a) of this section, a defendant's guilt of that other crime may also be established under section 13A-2-23. When the defendant's guilt of that other crime is established under section 13A-2-23, that crime shall be deemed to have been "committed by the defendant" within the meaning of that phrase as it is used in subsection (a) of this section. (Acts 1981, No. 81-178, § 2.)

Alabama Code § 13A-5-45 (1981) provides:

§ 13A-5-45. Sentence hearing—Delay; statements and arguments; admissibility of evidence; burden of proof; mitigating and aggravating circumstances.

(a) Upon conviction of a defendant for a capital offense, the trial court shall conduct a separate sentence hearing to determine whether the defendant shall be sentenced to life imprisonment without parole or to death. The sentence hearing shall be conducted as soon as practicable after the defendant is convicted. Provided, however, if the sentence hearing is to be conducted before the trial judge without a jury or before the trial judge and a jury other than the trial jury, as provided elsewhere in this article, the trial court with the consent of both parties may delay the sentence hearing until it has received the pre-sentence investigation report specified in section 13A-5-47(b).

Otherwise, the sentence hearing shall not be delayed pending receipt of the pre-sentence investigation report.

(b) The state and the defendant shall be allowed to make opening statements and closing arguments at the sentence hearing. The order of those statements and arguments and the order of presentation of the evidence shall be the same as at trial.

(c) At the sentence hearing evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to the aggravating and mitigating circumstances referred to in sections 13A-5-49, 13A-5-51 and 13A-5-52. Evidence presented at the trial of the case may be considered insofar as it is relevant to the aggravating and mitigating circumstances without the necessity of re-introducing that evidence at the sentence hearing, unless the sentence hearing is conducted before a jury other than the one before which the defendant was tried.

(d) Any evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama.

(e) At the sentence hearing the state shall have the burden of proving beyond a reasonable doubt the existence of any aggravating circumstances. Provided, however, any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing.

(f) Unless at least one aggravating circumstance as defined in section 13A-5-49 exists, the sentence shall be life imprisonment without parole.

(g) The defendant shall be allowed to offer any mitigating circumstance defined in sections 13A-5-51 and 13A-5-52. When the factual existence of an offered mitigating circumstance is in dispute, the defendant shall

have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence. (Acts 1981, No. 81-178, § 7.)

Alabama Code § 13A-5-49 (1981) provides:

§ 13A-5-49. Aggravating circumstances.

Aggravating circumstances shall be the following:

(1) The capital offense was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape robbery, burglary or kidnapping;

(5) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital offense was committed for pecuniary gain;

(7) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital offense was especially heinous, atrocious or cruel compared to other capital offenses. (Acts 1981, No. 81-178, § 11.)

Alabama Code § 13A-5-50 (1981) provides:

§ 13A-5-50. Consideration of aggravating circumstances in sentence determination.

The fact that a particular capital offense as defined in section 13A-5-40(a) necessarily includes one or more

aggravating circumstances as specified in section 13A-5-49 shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence.

By way of illustration and not limitation, the aggravating circumstance specified in section 13A-5-49(4) shall be found and considered in determining sentence in every case in which a defendant is convicted of the capital offenses defined in subdivision (1) through (4) of subsection (a) of section 13A-5-40. (Acts 1981, No. 81-178, § 12.)

Alabama Code § 13A-6-2 (1977) provides:

§ 13A-6-2. Murder

(a) A person commits the crime of murder if:

(1) With intent to cause death of another person, he causes the death of that person or of another person; or

(2) Under circumstances manifesting extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to a person other than himself, and thereby causes the death of another person; or

(3) He commits or attempts to commit arson in the first degree, burglary in the first or second degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree, sodomy in the first degree or any other felony clearly dangerous to human life and, in the course of and in furtherance of the crime that he is committing or attempting to commit, or in immediate flight therefrom, he, or another participant if there be any, causes the death of any person.

(b) A person does not commit murder under subdivisions (a)(1) or (a)(2) of this section if he was moved to act by a sudden heat of passion caused by provocation recognized by law, and before there had been a reasonable time for the passion to cool and for reason to reassert itelf. The burden of injecting the issue of killing under legal provocation is on the defendant, but this does not shift the burden of proof. This subsection does not apply to a prosecution for, or preclude a conviction of, manslaughter or other crime.

(c) Murder is a Class A felony; provided, that the punishment for murder or any offense committed under aggravated circumstances, as provided by article 2 of chapter 5 of this title, is death or life imprisonment without parole, which punishment shall be determined and fixed as provided by article 2 of chapter 5 of this title or any amendments thereto. (Acts 1977, No. 607, p. 812, § 2005.)

Alabama Code § 13A-6-43 (1977) provides:

§ 13A-6-43. Kidnapping in the first degree.

(a) A person commits the crime of kidnapping in the first degree if he abducts another person with intent to

(1) Hold him for ransom or reward; or

(2) Use him as a shield or hostage; or

(3) Accomplish or aid the commission of any felony or flight therefrom; or

(4) Inflict physical injury upon him, or to violate or abuse him sexually; or

(5) Terrorize him or a third person; or

(6) Interfere with the performance of any governmental or political function.

(b) A person does not commit the crime of kidnapping in the first degree if he voluntarily releases the victim alive, and not suffering from serious physical injury, in a safe place prior to apprehension. The burden of injecting the issue of voluntary safe release is on the defendant, but this does not shift the burden of proof. This subsection does not apply to a prosecution for or preclude a conviction of kidnapping in the second degree or any other crime.

(c) Kidnapping in the first degree is a Class A felony. (Acts 1977, No. 607, p. 812, § 2210.)

Alabama Code § 15-2-3 (1940) provides:

§ 15-2-3. Same—Offense commenced in state and consummated elswehere.

When the commision of an offense commenced in the slate of Alabama is consummated without the boundaries

of the state, the offender is liable to punishment therefor in Alabama; and venue in such case is in the county in which the offense was commenced, unless otherwise provided by law. (Code 1852, § 395; Code 1867, § 3943; Code 1876, § 4634; Code 1886, § 3718; Code 1896, § 4970; Code 1907, § 7227; Code 1923, § 4893; Code 1940, T. 15, § 93.)

Georgia Code § 26-1101 (1968) provided:

26-1101 Murder

(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

(c) A person convicted of murder shall be punished by death or by imprisonment for life.

(Acts 1968, pp. 1249, 1276.)

Georgia Code § 27-2528 (1973) provided:

27-2528 Sentence to life imprisonment or lesser punishment by judge on plea of guilty to an offense punishable by death

Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may, in his discretion, during term time or vacation, sentence such person to life imprisonment, or to any punishment authorized by law for the offense named in the indictment: Provided, however, that the judge of the superior court must find one of the statutory aggravating circumstances provided in section 27-2534.1 before imposing the death penalty except in cases of treason or aircraft hijacking.

(Acts 1956, p. 737; 1973, pp. 159, 171.)

Georgia Code § 27-2534.1 (1973) provided:

27-2534.1 Mitigating and aggravating circumstances; death penalty

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement.

(c) The statutory instructions as detrmined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at last one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed.

(Acts 1973, pp. 159, 163.)